

No. 15926

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United States  
Court of Appeals  
for the Ninth Circuit

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ALFRED V. HAGEN,

Appellant,

vs.

CITY OF PALMER,

Appellee.

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Supplemental  
Transcript of Record

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Appeal from the District Court  
for the District of Alaska,  
Third Division

FILED

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Appeal from the District Court  
for the District of Alaska,  
Third Division



In the District Court for the District of Alaska  
Third Division

No. Cr. 3582

CITY OF PALMER,

Plaintiff,

vs.

ALFRED HAGEN,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable J. L. McCarrey, Jr.,  
U. S. District Judge.

October 23, 1957—10:50 o'Clock A.M.

Appearances:

For the Plaintiff:

JOHN D. SHAW,

City Attorney, City of Palmer.

For the Defendant:

CHARLES E. TULIN,

BOYKO, TALBOT & TULIN,

Attorneys at Law.

The Court: I am sorry to keep counsel and the litigants waiting in the case of the City of Palmer, Plaintiff, vs. Alfred Hagen, Defendant, Criminal No. 3582. Mr. Shaw, you may make your opening statement. Will you please proceed, Mr. Shaw?

Mr. Shaw: If it please the Court, Mr. Tulin:

This is a case involving the City Sales Tax Ordinance of the City of Palmer, which has been in effect since July of 1951. The Defendant was charged in the Complaint with failure to file his sales tax return in accordance with the provisions of Ordinance No. 40, and he was tried, convicted, sentenced to pay a fine of \$50.00, and he appealed to this Court. Mr. Tulin and I have reached, I think, complete agreement in regard to the material facts on this case and are willing to stipulate to the facts in order to avoid putting on testimony, if that meets with the approval of the Court.

There are one or two matters we didn't reach full accord on, but I think perhaps we can go ahead anyhow and——

The Court: Supposing you go ahead then, counsel, and state into the record your oral stipulation and thereafter I will expect you to reduce it to writing.

Mr. Shaw: Very well, your Honor. I will give our stipulations here, subject to Mr. Tulin's objection, if there is anything he objects to.

It is to be stipulated that Palmer has a Sales Tax Ordinance; [2\*] that Section 6 thereof provides for the filing of returns by the end of the following month in which the tax was collected from the public. I should have said Section 6—or, correction—Ordinance 40, as amended, provides that it be paid by the last of the month.

Second, that the Defendant in this case did not

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\*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

make timely filing of his sales Tax Report as required by the Ordinance.

Third, that Section 9 of Ordinance No. 40 provides a penalty of \$25.00 for the first offense and \$100.00 for the second offense.

Next, that the Defendant was in business and did collect sales tax money from the public in the usual course of his business at all times; and

Last, at this time, that he had failed to file his return and make his payments other months, according to the City records, but was charged in this case only with one month.

Is that agreeable?

Mr. Tulin: That is agreeable, your Honor.

The Court: Now, what were the areas that you were not able to agree upon?

Mr. Shaw: Beg your pardon?

The Court: What were the areas in which you were not able to agree upon?

Mr. Shaw: We were unable to agree upon a matter which I probably shouldn't mention to the Court without Mr. Tulin's [3] consent.

Mr. Tulin: I am just wondering, your Honor, if that is the case on behalf of the City of Palmer? If we stipulate to those facts, it will alleviate introducing any testimony on their behalf, and the Defendant is prepared at this time to make a motion, if there are no further stipulations into which we can enter at this time.

The Court: Well, of course, I am concerned about your position. What is your defense?

Mr. Tulin: Well, your Honor, the Defendant



would like to move for a judgment of acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, on the grounds that the Palmer Sales Tax Ordinance No. 40 was passed without enabling legislation; that it was without sanction of Territorial law at the time that it was passed, and that it is, therefore, void.

The Court: Well——

Mr. Tulin: The argument I would like to present at this time, your Honor, in support of that motion, if there is nothing further that we can stipulate to. Does the—I might inquire whether the City of Palmer rests at this time.

Mr. Shaw: Yes. Before I rest, though, I would like to state that before the case is finished, I would reserve the right to make one further stipulation. If Mr. Tulin won't agree, we might have to bring it to Court.

The Court: Well, let's have it all at this time so [4] we will know where we are going. What is that proposed stipulation?

Mr. Shaw: Well, your Honor, it is on the question of whether or not a previous conviction should be shown in this matter by stipulation.

Mr. Tulin: It would be my position, your Honor, that it would have nothing to do with the merits, of the guilt or innocence of this particular offense.

The Court: Excepting this, it goes to the weight.

Mr. Tulin: If the Defendant were to take the stand, it certainly would be a matter for credibility but he is not taking the stand. There is no need of



taking the stand. It turns on a question of law, which I propose to argue.

The Court: Well, if the Defendant does not take the stand, then, of course, it would not be proper. Then the Court would propose this: That counsel for the respective litigants prepare a written statement in conformance with the oral statement put into the record this morning. The Court would give counsel for the Plaintiff 20 days in which to present a brief and counsel for the Defendant may have 20 days in which to answer that brief. Then the Court would request that the City reply within 10 days to the answering brief of the Defendant. Is there any objection?

Mr. Tulin: Your Honor, I was wondering whether oral argument could be presented at this time? Are you desirous of [5] hearing oral argument at this time?

The Court: No; I prefer to have you submit your briefs and then argue your case. You see then you would have the law to present to the Court. It would be well for you, as well as it would be for the Court. Any objection to that?

Mr. Shaw: No objection. I would like to go ahead with it today, too, but, if I understand, the Defendant has 20 days in which to file his brief?

The Court: You have 20 days. Now, if you wish to shorten it, I would be glad to do so.

Mr. Tulin: See, I would be the moving party, your Honor. I would submit my brief in shorter time perhaps than Mr. Shaw, and he could file his answering brief. I could file my brief.

Mr. Shaw: The Defendant is the one to file the first brief because he is attacking the validity of the law in which this Sales tax——

The Court: That is correct, yes.

Mr. Tulin: Would it be possible at this time to set the date of the oral argument on the written briefs, your Honor?

The Court: Well, I would prefer to have the briefs in because it has been my experience that counsel always asks for additional time on briefs. Let's get the briefs in and then let's talk about the serious part of it. I know of only one or two exceptions where it has come in on time and that's in four years' experience now, no, over four years' experience. [6]

Mr. Tulin: Are you in accord, Mr. Shaw?

Mr. Shaw: Yes. I will—I would like to have the Court hear it. He might dismiss the motion that we——

The Court: Well, you stipulated to the facts. I think the Court is entitled to your research and then thereafter we could have you argue it and maybe—at that time, you see, it will be concluded in any event, no matter how the Court would rule; the matter stipulated to and submitted to the Court so that there would be an ultimate determination.

Mr. Shaw: Well, I think, your Honor, too, that because of the complexity of the statute, that perhaps the law before the Court would be definitely helpful in seeing the position of the respective parties.

The Court: Yes. Very well, then. I would also

entertain from counsel a shorter time if you want to do so.

Mr. Tulin: Your Honor, I could have my brief prepared within 10 days.

The Court: Could you submit yours?

Mr. Shaw: If he prepares his in 10 days, your Honor, I will have mine a week later.

The Court: Very well, counsel then may have 10 days each way and then the reply brief five days.

Mr. Tulin: Yes, your Honor.

The Court: Very well. That will be the order of the Court, and now let me have it understood clearly that you will [7] reduce this stipulation to writing?

Mr. Tulin: Yes.

The Court: And make that a part of your record here. Very well. That will be the order of the Court then.

Does the Clerk have anything else on her desk at this time?

Deputy Clerk: Nothing on the Clerk's desk, your Honor.

The Court: This Court will go into recess until the call of the gavel. [8]

November 15, 1957

The Court: The next matter is the case of City of Palmer, Plaintiff, vs. Alfred Hagen, Defendant. Criminal No. 3582. You may proceed, Mr. Tulin.

Mr. Tulin: Your Honor, the basis of this motion for judgment of acquittal is upon the fact that the Palmer Sales Tax Ordinance No. 40 was passed at

a time when there was no enabling legislation of any kind in effect.

The Court: Pardon me. May I interrupt you, please? The problem that concerns me most in your case is that you argue that the Act passed concerning school districts, and so forth, also abrogated the sales tax. I have a little difficulty in seeing that.

Mr. Tulin: Well, your Honor, the 1949 Legislature passed the Act which was Chapter 38, which amended 16-1-35, subsection 9. That Act provided in two sections, A and B, first for a general property tax for school and municipal purposes, and, second, for a consumer sales tax. Thereafter in 1951 the Legislature again convened, of course. They did raise the general property act under Section A, but omitted any question at all as to Section B. There's questions along the type of repeal by implication, it seems to me, and I have authority for the fact that since they attempted here to reinstate, that is, to reenact 16-1-35, subsection 9, they say that that section is amended to read as follows, and then they go on to set out the [10] taxes that would exist at that time, and they entirely omit the 1949 amendment as to consumer sales taxes. Sutherland on Statutory Construction holds that in such cases this is a repeal by implication, particularly when the amendment, the consumer sales tax provision is itself an amendment, and when a subsequent Legislature amends the original enactment and omits the 1949 amendment as to consumer sales tax, they thereby repeal by implication which would not necessarily be the case if they had, let's say, just omitted

a section from the original enactment; but the fact I rely on is that the consumer sales tax was omitted. It was omitted from a subsequent amendment, from the original enactment.

The Court: But assuming the sales tax was amended and that the subsequent statutory enactment by amendment failed to include that, and there is no reference made to it in the title, then can't the Court presume and isn't it also a parallel rule of thumb on statutory construction that a statute is presumed to be constitutional?

Mr. Tulin: We have, first of all, your Honor, a presumption against the validity of questionable taxes when the issue clouds the validity of taxes, but, be that as it may, this enactment, the entitlement of the 1951 statute was a general tax for school and municipal purposes; relating to a general tax for school and municipal purposes, then laid out what was to be covered. [11]

The Court: But specifically excludes sales taxes.

Mr. Tulin: But, your Honor, in my reply brief here I point out to the Court that whenever you have an amendment, that the subject or the title to the statute shall include only one subject. Now, they didn't come out and say, "We repeal the 1949 provision of consumer sales tax." They didn't do that, but it is not necessary.

The Court: Pardon me just one moment, please. Mr. Johnson, will you go to my secretary and have her bring the recent decisions from the Ninth Circuit Court of Appeals? I would call your attention to a case that was decided just recently, not re-



cently, in June of this year, concerning the question of repeal and amendment concerning the American Can case. It was a case that was heard in the First Division and it's a good discussion along the lines that you are now urging upon the Court. "When there is a doubt as to the intent of the Legislature, one way of resolving that might be to the title of the Act."

Mr. Tulin: Well, here the title, of course, is a general tax for school and municipal purposes; in other words, the subsections are A, B, and C. Whatever they wish to add would cover a general tax for school and municipal purposes. They have a property tax. They later put in the consumer sales tax in '53 again and they put in a tax on vessels for the general purpose as set out in the title.

The Court: I call your attention to Chapter 38 of the [12] 1949 Session Laws of the Territory of Alaska when it says in the title, "To empower City Councils, pursuant to referendums, to levy sales taxes within their respective municipalities." Now, let's go to your 1951—what is the chapter in 1951?

Mr. Tulin: That is Chapter 47, your Honor. You will note there, your Honor, it omits entirely any mention of sales taxes.

The Court: That is the point I am making. That is the very point I am making.

Mr. Tulin: But they do point out, your Honor, that Section 16-1-35, ACLA 1949, as amended by Chapter 38, pertaining to a general tax for school and municipal purposes is amended to read as follows. Now, it is my position there that the omis-

sion—certainly they allege right in the title that this is all inclusive. It embraces the subject of general taxes for school and municipal purposes and to satisfy the needs of cities of the first class. “We are going to permit a tax on real property,” and notice how they raised it by that very session law. They raised the permissible amount to three per cent, I believe from two to three per cent, but elected to deny the cities of the first class “the ability to levy retail sales taxes.”

The Court: Let’s go back to the 1949 Compiled Laws. No. 9 provides specifically, “General tax for school and municipal purposes.”

Mr. Tulin: Your Honor, the 1949 Session Laws provide, [13] “To empower City Councils, pursuant to referendums, to levy sales taxes within their respective municipalities and so on.” Then you come to your 1951 Session Laws and it says, “Amending Subsection 9 of Section 16-1-35, ACLA 1949, as amended, pertaining to a general tax for school and municipal purposes. Now, it says nothing about the sales tax whatsoever. You could amend a portion of the amended section, but it need not necessarily repeal the entire section.

Your Honor, I rely upon Page 423 of Sutherland on Statutory Construction and the cases cited there reflect that with a factual situation, such as we have here, that we do have a repeal by implication, particularly in light of the fact there is a strong presumption of the action; also, the fact in ’53 the Legislature came back again and put in the consumer sales tax certainly indicating their intent at



that time. It certainly reflects the fact that they realized they had omitted it in 1951.

The Court: What is the chapter in '53?

Mr. Tulin: That is Chapter 121, your Honor. Let me go one step further in that same case. It says, "And validating sales taxes already collected and declaring an emergency." Certainly, isn't that realization that they didn't have an enactment in effect in '51? They attempted to cure it in '53 by saying, "Any taxes collected before this date are valid." They didn't say, "Any ordinances passed prior to this date are valid." They say, "any taxes collected were valid" and that is not the [14] issue here. They didn't validate the ordinance. They only validated taxes collected, but they did realize and they expressed their intent there, "We realize we didn't have a law in effect prior to this date," and that's why that provision.

The Court: The case I am referring to is the Territory of Alaska, Appellant, vs. American Can Company, Fidalgo Island Packing Company, et al., Appellee. No. 15,070, decided June 27, 1957.

Mr. Tulin: I might point out——

The Court: Just a moment, please. And calling your attention particularly to Page 5, "Title saving section of the repealing act overrides general saving statute," which I think would be very much in point in this case. They cite here particularly, "Where doubt exists as to the meaning of the statute, the title may be looked to for aid in its construction."

Mr. Tulin: But we are—at a later date, two

years later, they come back and realizing they had omitted it, attempt to put in a savings clause which is inadequate because it only says "taxes collected." It doesn't validate the ordinance. They express this intent, it is quite apparent.

The Court: Excepting this, counsel, we have a general savings statute that may have saved that portion of the original act which was not amended and the argument or discussion of the law on that point is, I think, very well set out here.

Did you have anything else? I didn't mean to interrupt. [15] I just wanted to get the real issue of the problem before the Court.

Mr. Tulin: I might just point out one thing. Consumer sales taxes was the entitlement of the '49 provision. It did include the sales tax and it did also in 1953, but in 1951 it was entirely omitted and I think that bolsters the position that in 1951 they intended to omit the sales tax portion.

The Court: Very well. Mr. Shaw, the Court will hear you then.

Mr. Shaw: If it please the Court and Mr. Tulin, I'd like to make this very brief statement. While this case is heard on stipulation, and thereby obviating the necessity of evidence being presented before the Court, this is more than a technical violation of a city ordinance or a law. This case represents a serious culmination of most reprehensible conduct on the part of the Defendant in that he has collected sales taxes from the people of Palmer and the surrounding area, actually collected the money in the operation of his business, and carried that money

in his pocket or used it, or whatever he may have done with it, for months without rendering and filing a return or surrendering it to the City of Palmer.

The Court: Then do I understand he has taken advantage of the Act, then at this time endeavors to state that the Act is not constitutional?

Mr. Shaw: Indeed he has, your Honor. [16]

Mr. Tulin: Are those facts in the stipulation before the Court here? Are those particular facts as to whether or not he has actually collected the tax?

Mr. Shaw: The fact is stipulated that he did collect the tax from the public, unquestionably.

The Court: That's a very important point. That's tantamount to having your cake and eating it, too.

Mr. Shaw: That is Item 2 of the stipulation of facts, your Honor.

The Court: Just a moment. Let me get this in the file.

Mr. Tulin: Your Honor, I'd like to point out that the charge is failure to pay the tax on time. The tax has been paid. The tax has been paid with penalty and with interest to the City. The only charge here is failure to pay it on time.

The Court: Number 2, "That the defendant collected sales tax from the public, in the usual course of his business, during the month of August, 1956, in accordance with the requirements of Ordinance No. 40." Then the next one, Number 3, "That the defendant failed to make timely filing of the sales tax return as charged in the complaint." Were these taxes paid to the City under protest?

Mr. Shaw: No, your Honor, never.

The Court: Well, it appears to the Court then there isn't much use of hearing any further argument on the matter, [17] unless you have another point.

Mr. Shaw: If it please the Court, I would like to call your attention to the fact that there is one stipulation, Number 7, which was agreed to on condition that it be used only for the purpose of sentencing in case the Defendant is found guilty. He has been convicted previously——

Mr. Tulin: I don't think we have resolved the issue. I think very definitely there is an issue before the Court. He was charged with failing to pay his tax on time. He actually went in and paid it before the time—it wasn't—it was served on him, arresting him.

The Court: Well, but my question was whether or not he paid those taxes under protest.

Mr. Tulin: He didn't perhaps make a written protest, anything of that sort when he made payment, but he very definitely did. He objected to the tax. That was the reason for his delinquency.

The Court: There is no stipulation to that effect.

Mr. Tulin: I think, certainly, the Town of Palmer stipulates to that fact.

Mr. Shaw: Your Honor, it would be utterly impossible in this case. This man has missed so many months of bringing in his tax that perhaps it would be better if we proceeded here and your Honor heard it all. I agreed to this matter of stipulation in hopes of saving time here and it's all to the ad-

vantage [18] and benefit of the Defendant that we do stipulate, but there were so many months of violations, which he can never deny, that it would be utterly fantastic to consider such a stipulation.

Mr. Tulin: Could I have one last word?

The Court: Let me ask you this, Mr. Tulin: How can a person come in and contest the validity of a statute and ordinances on taxes when the taxes were not paid under protest?

Mr. Tulin: This is a criminal penalty, your Honor, he is contesting.

The Court: Yes, but the statutory validity of the statute is here in question.

Mr. Tulin: He can't be penalized under a statute which was passed without enabling legislation, something that is void. Can he be penalized in a criminal action here now for filing his return late when the statute itself was void? And, your Honor, I have just one last and closing—I wonder if I could cite this one last citation to the Court?

The Court: Very well.

Mr. Tulin: Found in Sutherland on Statutory Construction, Page 423, and it says, "As a general rule, if the new amendment—and the new amendment here would be the 1951 provision—if the new amendment purports to set out the original act or section—that would be 16-1-35, as amended—generally indicated by the phrase 'to read as follows,' and fails to re-enact the prior amendment—which would be the '49 provision—therein the [19] prior amendments are considered repealed," and there are numerous Federal cases to support that contention.



Mr. Shaw: If it please the Court——

The Court: Yes.

Mr. Shaw: I think there's another aid in the rules of construction for a Court on these things. I'd like to call your Honor's attention to the Organic Act which says, "No law shall embrace more than one subject which shall be expressed in its title." Back to your Act of 1951, there is nothing in the title pertaining in any way to the sales tax provision, mentioning it in any manner. The only reference is made to that general tax for general purposes and here is the wording pertaining to a general tax for school and municipal purposes, "That heading on general tax action which involves real and personal property, has been carried all the way through since there has been legislation on the subject and the sales tax part has always been under a different heading." To follow the argument of the Defendant's counsel here, that the act, the sales tax act could have been repealed by implication would come in bold and sudden conflict with the Organic Act which says the subject must be expressed in the title. They didn't mention the sales tax act. They didn't say they were repealing it. They didn't make any reference to it; the only reference was to the property tax which they amended and made a change.

Mr. Tulin: Your Honor, to absolutely rebut the motion, [20] I'd like to cite 9 Alaska 573, which states, "If it is an amendatory act, then this rule does not apply"; in effect, does not apply in a case like this. 9 Alaska 573.

The Court: Are counsel through then?

Mr. Shaw: I have one thing more to say, your Honor. If Mr. Hagen, the Defendant, had an honest conviction and were going to contest this case, as has been stated here, his remedy was not to collect the taxes. That is what he should have done, is failed to refuse to collect it, then he could have his test, but when he collected it from the public and didn't surrender it to the City, he's in direct——

The Court: Well, but my big concern is when the taxes were collected by the Defendant and then paid, but not paid under protest. That's the thing that bothers me at this time more than any other point.

Mr. Tulin: It's our position that he verbally protested. He paid it under protest and that intent of his was expressed to the people concerned, although it wasn't in writing, your Honor.

The Court: Well, the best evidence of that, of course, would be the record to that effect and I am bound by the record.

The Court will have to reserve decision, as of necessity. [21]

January 6, 1958

The Court: This was the time set down for the imposition of sentence in the case of City of Palmer, Plaintiff, vs. Alfred Hagen, Defendant. Criminal No. 3582. Mr. Shaw, you may make your statement.

Mr. Shaw: If it please the Court, I think I am impelled to say something about Mr. Hagen's culpability in this matter. He has been convicted one



other time before under the same identical charge of failure to file his sales tax return and pay his money into the City of Palmer and at that time, if my memory is correct, he was seven months behind. The thing I want to point out is that every time Mr. Hagen has failed to pay his tax return to the City under the Sales Tax Ordinance, that when he did pay it, it always showed that he had collected it regularly in the course of his business during the period for which he had not paid, so it amounted in every case to a withholding of public money, money collected from the people who patronized his business and failing to turn it over to the City by the 10th of the following month, as required by the law.

I have in my pocket Mr. Hagen's tax record from the City files beginning back as early as 1952 and while I haven't checked it over in detail, it shows that most of the payments were late; only a very few of his payments in the period of five years have been made on time, but in between he would fall further and further behind, as I said, to the point where he in one instance went [23] seven months. And in the case at hand, while he was charged with failure only to pay for one month, he was in fact three months behind at that time, but he was charged only with one and that is what he is being prosecuted on.

The City Council—I am the City Attorney, have been for several years—and the City Council, your Honor, repeatedly brought to Mr. Hagen's attention, to the Mayor's attention and to others, the

failure of Mr. Hagen, along from time to time with other people who also failed to pay in their returns. There are other people at Palmer, just a few cases, but there have been others who have been arrested, charged, tried and convicted for this same thing. Since the last arrest in this regard, a few months ago, we have had no trouble except in the case of Mr. Hagen.

Now, he used to be the Mayor of Palmer. He served with distinction for several years on the City Council and——

The Court: Pardon me. Was he the Mayor and/or City Councilman during the time this sales tax was collected and enforced?

Mr. Shaw: That is correct, your Honor. As Mayor he was charged with the duty, while he was Mayor, of enforcing this very ordinance and I think that due to his position of trust and honor at that time in the City, that it behooves him to be a better citizen than the average even, if necessary, and to act in good faith and I think that in view of the long record of his [24] delinquencies and his failures to pay the money he has collected from the people into the City Treasury, when the City was in desperate need for it—the City of Palmer for years has operated on a sales tax, now we have a small property tax just this year—but I think that some form of punishment should be provided to act as a deterrent to this sort of procedure that has gone on for such a long period of time and I have already recommended in my pleadings that he be fined the maximum and I feel candidly, your Honor,

that this case calls, in all fairness and justice, for some kind of a jail sentence; a 30-day jail sentence suspended, your Honor, I respectfully submit or perhaps one day in jail to serve.

The Court: Thank you. Very well, Mr. Plummer, did you wish to add anything to that?

Mr. Plummer: No, your Honor, other than what I have said in the presentence conference in your chambers. I am sympathetic with the position taken by Mr. Shaw and I feel that something should be done to deter this type of activity on behalf of the other citizens of the Palmer area.

The Court: Very well. Mr. Tulin.

Mr. Tulin: Your Honor, I'd like at this time to renew the Defendant's motion for judgment of acquittal and I base this motion of renewal upon the Court's written decision of December 31, 1957. Now, on page two in the second paragraph of that decision I think the Court accurately states the law; which law I am in [25] accord with. In paragraph two it states that, "The sole issue to be determined by the court in this case is whether one who has collected taxes under a city ordinance authorized by Territorial statute, can now refuse to pay said taxes to the taxing authority on the grounds that the law under which the taxes were collected were illegal and void." Now, as I said, I am in accord with that statement of the law, however, in the factual situation before us, the Defendant here has never denied the right of his principal to receive the taxes. He has collected them. He has never denied the right of Palmer to have the money. All

he says is that he was late in getting it in. He is not charged, you will note, with failing to pay over the sales tax, but, rather, he is charged with failing to timely pay that sales tax.

Now, for the reason primarily then that the tax has been paid and it was paid just prior to or at the time of his arrest, I think then that we do have to consider the validity of the original—or, the amendatory statutes or the ordinances here in question before we can impose a criminal sentence against him.

The Court: Pardon me. Let me check the record. If I am reading from the proper complaint, the complaint reads as follows: "Alfred V. Hagen is accused by Bernard R. Bouwens in this complaint of a misdemeanor, that of failure to file sales tax returns committed as follows, to wit: The said Alfred V. Hagen, d/b/a Valley Theatre in the City of Palmer, Alaska, and within the [26] jurisdiction of this Court, did, wilfully fail to file a sales tax return for retail sales and service made and performed during the month of August, 1956 \* \* \*"

Mr. Tulin: Your Honor, I call your attention again to the memorandum of December 31, that is paragraph three of the stipulation. It states, "That the defendant failed to make timely filing of his sales tax returns as charged in the complaint," and I felt that that stipulation clarified the position taken by the City of Palmer. That it was the failure to timely pay the tax return.

The Court: Well, in that respect I am surprised that counsel for the City would enter into such a



stipulation when the complaint is to the contrary. There has been no denial of the complaint itself. I didn't check that. Anyway, you may proceed.

Mr. Tulin: Your Honor, then we come to the position where in fact the Defendant has not denied the right of his principal to receive the taxes and has, as indicated in the file here, he paid them either just before or at the time of his arrest, paid not only the taxes, but the penalty and the interest therewith.

Now, it is my position that that being true, we come to the issue of whether or not criminal sanction, as involved in Ordinance No. 10, can be applied against this man and whether he can be sentenced pursuant to the criminal portions of the [27] ordinance. It is my position that when we consider the criminal aspect of the thing, that it is necessary for us to determine the validity of the original and the amendatory statutes and thus the ordinance in issue here. On page two of the Court's opinion, again referring to that page, in paragraph three, it states that, "I am of the opinion and hereby find that it is not necessary for the Court to determine the validity of the original or amendatory statutes or the ordinances here in question, for the reason that the defendant collected said taxes in question, and, therefore, is now precluded from challenging the constitutionality of such statutes." And later the Court stated, "That he cannot now deny the right of his principal to receive the money," and I just point out to the Court he has never denied the right of the principal to receive the money. He has just

been late in paying it over. Now, when we consider the criminal portion of that ordinance, we have got to resolve the validity of that ordinance or we'd be sentencing this man under illegal statutes and that cannot be done.

The Court: Mr. Shaw, do you wish to reply?

Mr. Shaw: If it please the court, I would point out that he has been charged and plead guilty to the same offense on a previous occasion, as the record shows, and the use of the word "timely" in there is immaterial. The ordinance provides that the sales tax return must be filed on or before the 10th of the following month. Now, for the purpose of this action, Mr. Hagen [28] was only charged with one month, particularly the month of August, I believe, but he was charged with failing to file his sales tax return as required by the ordinance and, of course, implied with the failure to file the return is failure to pay. One can't pay the tax until he files the return. There is no way he knows how much it amounts to.

The Court: I am interested in hearing you on the point Mr. Tulin makes in that he renews his motion for judgment of acquittal because now he says he is in position to challenge the constitutionality of the statute and the ordinance.

Mr. Shaw: I don't understand, your Honor.

The Court: Well, you heard Mr. Tulin make the motion to the Court for judgment of acquittal because now he feels that the Defendant has paid the taxes, that he failed to pay heretofore, into the

proper authorities and now he wants to challenge the constitutionality of the statute itself.

Mr. Shaw: I think it's too late for him to challenge the constitutionality of the statute now, your Honor. When the 10th day of October—I hope I have my dates correct here—of September arrived and passed and Mr. Hagen hadn't filed his return and paid the money in for the previous month, he was in violation of the statute and subject to the criminal penalties thereof, and, as such, he has been charged.

Mr. Tulin: Your Honor, just in brief rebuttal, I'd like to point out there is no law of estoppel to sentence a man [29] under illegal statutes. It may be grounds for him to pay money to the City, but no justice for sentencing him under an illegal or void statute and that issue would have to be determined, could not be resolved on just the law of estoppel or equitable estoppel or trust.

The Court: Mr. Plummer.

Mr. Plummer: I am not familiar with the case and probably should not say anything, your Honor, but it would appear to me that if the Defendant Hagen wished to challenge the constitutionality or the validity of the ordinance the time to have done it would have been at the time when he was supposed to collect this tax from the people. What he did, if I understand the facts correctly, was to, every time the customer came in he would collect the tax. Now, he had to collect it under this ordinance. That was his only authority for doing so, collecting it for seven months and putting the money in his pocket



or used it in his business, then it would appear to me it would be an awfully, awfully poor place to challenge the validity of the ordinance. I think what he should have done, if he thought the ordinance was invalid, was refuse to follow the ordinance rather than collecting the money and going along saying, "It's all right. It's a good ordinance as far as collecting goes. It's only bad when I have to pay it out." That doesn't make sense to me.

Mr. Tulin: Your Honor, there is one thing that I'd [30] like to emphasize in this matter of law. We are not here playing with emotions or which would be the best route to attack the constitutionality of this statute because I think it is pretty clear by this time that this Defendant was not attempting to attack the constitutionality at the time, but, rather, he was dilatory or late in getting the money in, but even at that it is a question of law whether you can sentence a man under an illegal or void statute. That cannot be done. Maybe it is grounds to say you have, you as the Defendant have to pay the moneys you have collected over to the City. You are in a position of trust in collecting them, but it doesn't, it can't create validity to a statute which possibly is void and that issue of the validity of the statute certainly has to be resolved before we can sentence this man.

The Court: Mr. Hagen, will you please come forward with your counsel?

Motion for judgment of acquittal is denied. I feel that Mr. Plummer has pointed out the real issue, he felt that if Mr. Hagen wanted to test the constitu-

tionality of the statute, he would have refused to have collected everything: having once collected it, I feel you are not in position to raise that issue at this time.

Mr. Hagen, do you have anything to state before the Court imposes sentence?

Defendant Hagen: I'd just like to bring out that upon [31] paying my tax and paying the penalty and interest, and each and almost every time the penalty and interest was paid, if I was behind on my payments, and I was on this charge of August, whatever it was, I paid the penalty and the interest prior to the time that they served the warrant on me and at that time Mr. Shaw was standing there and watched the procedure. I got a receipt from the City Clerk at the time in which he noted that the penalty and interest was paid and I, myself, feel that the penalty clause was put in there for people who are behind or get behind on their payments, the same as your light bill, the same penalty and interest is put on your income tax if you are behind, and I paid the penalty and paid the interest and they accepted it and then they turn around and throw the criminal charge against me. That's all I want to say.

The Court: Of course, they have two distinct rights, you understand, Mr. Hagen. They would have the right to civilly collect those taxes, interest, and penalty, as they have done, and file a criminal charge, which is the case before the Court. Do you have anything else to state to the Court?

Defendant Hagen: Well, yes. Mr. Shaw has

brought out that I was behind one other time. That is true. I was behind one other time. Mr. Shaw and a few of them decided they were going to get tough on some of the businessmen. I was one of them. The City Clerk called me up, so I went up there. He said bring your sales tax, so I went up. I said, "I have only got two or [32] three months completed," and I paid it, paid the penalty and interest. He said, "When can you get the other in?" I said, "I will work all night and come in tomorrow morning and pay it." I did. I worked practically all night to get my files together, my bookkeeping. I went down there and paid it. On the way to pay I had the paper stuck in here and they served the papers on me. It's a personal deal entirely between John Shaw and myself. That is what it is and the matter involved the City Clerk, who also was a judge, and he told me before the time he sentenced me, "I am going to run you out of town." He said, "I helped run Colonel Olson out. I am going to run you out." He made that statement behind the desk, fined me, and John Shaw sat there on the same deal with him.

Mr. Shaw: Maybe this is not the time for me to inject, but this is wholly, completely untrue, what this man is saying here. It is an insult to the intelligence of the Court for him to be trying to testify in this case on things like this. Why didn't he take the witness stand when the case was called here instead of stipulating if he had something like this to tell? I object. It is completely false.

The Court: The Court always grants defendants coming before it an opportunity to express them-

selves and he has been accorded the same opportunity. Do you have anything else you'd like to state?

Mr. Tulin: I haven't spoke at all in mitigation. I'd [33] like to point out this is similar to collecting Government money, money which was never his, and like to point out to the Court, as the Court is very familiar, numerous businesses in this area sometimes get behind on the payment of those things, just as this man did, but if the case were the Internal Revenue, as long as there is no fraud involved or deceit, all that is charged is penalty and interest. As provided by this ordinance, the City of Palmer, I'd like to point out I don't think the code element is sufficient to impose a substantial sentence in this case.

The Court: I don't quite share your viewpoint, Mr. Tulin.

Mr. Tulin: Your Honor, it's a case of becoming delinquent, mismanagement in bookkeeping. It's not intended to defraud.

The Court: Well, counsel, though, in this case your client is a former mayor and also former councilman and he saw that this matter was fully enforced, apparently, at the time he was in charge.

Mr. Tulin: Yes, your Honor, but I think, as has been pointed out, there are numerous people who get behind, very prominent people. It's mismanagement; not intent not to pay or concealing of the City's moneys; just perhaps not making quite enough money or the bookkeeping is unsound or administrative procedures are lacking, but there is no



intent to take the City's money here. He never denied owing it. He never refused to pay [4] the City. That is what I emphasized.

The Court: Well, Mr. Hagen, it is the judgment and sentence of this court that you, in conformance with the recommendation of Mr. Shaw and Mr. Plummer, that you be fined the sum of \$300.00.

It is the further judgment and sentence of this court you be committed to the United States Marshal of the Territory of Alaska or his duly authorized representative for a period of 30 days, 29 days thereof to be suspended. That means one day to serve. You may step down. I request you submit yourself to the United States Marshal tomorrow morning at the hour of 9:00 a.m. to serve that time.

Mr. Shaw: Would you like for me to prepare the judgment, your Honor, or the District Attorney?

The Court: Well, counsel can work that out among themselves as to how that is accomplished.

Mr. Tulin: Your Honor, could some provision be made for the payment of this money because of the financial condition of the defendant?

The Court: I have no objection to such a proposal. What would you recommend?

Mr. Tulin: About \$100.00 a month, your Honor. \$100.00 now and \$100.00 a month, if that would be satisfactory with the City Attorney of Palmer.

The Court: Any objection, Mr. Shaw? [35]

Mr. Shaw: I have no objection.

The Court: When will the first payment be made, Mr. Tulin?

Mr. Tulin: Tomorrow, your Honor.

The Court: Very well, and then on the 7th day of each month thereafter until the total sum of \$300.00 has been paid. Now, Mr. Tulin, will the Defendant waive his right to be present upon the formal presentation of the judgment?

Mr. Tulin: Yes, he will, your Honor.

The Court: Very well, you may be excused then. You understand now, the Defendant is to report tomorrow morning to the United States Marshal.

Mr. Tulin: Would you inform the Defendant here the exact hours of that confinement?

The Court: For one day and I said 9:00 o'clock, if that is not too early.

Mr. Tulin: I wonder, your Honor, perhaps—the way it is snowing I wonder if perhaps we could make it a little later in the day; just a possibility there may be some problem getting back here in Anchorage.

The Court: Mr. Shaw, what would be your position?

Mr. Shaw: I agree, your Honor. The roads are slippery and you never know how long it is going to take to get in. I am perfectly willing to give him some extra time.

The Court: Well, I point out to you, Mr. Tulin, you [36] better bear the welfare of your client in mind—if he comes in early then he can get it over with in one day, but if he doesn't then that means he will have to stay overnight. So I think it would be to his advantage to be in here early.

Mr. Tulin: Is this a 12-hour day we are referring to?

The Court: That is a matter that will have to be determined by the Alaska Jail System. He is sentenced to serve one day, and what that consists of I am not in position to technically advise you. Can you help us, Mr. Plummer?

Mr. Plummer: No; I cannot, your Honor.

The Court: They have rules and regulations that would define that in detail.

Mr. Tulin: Your Honor, if he finds it is a 24-hour period, he could be committed this evening and stay right in town as long as he is here.

The Court: Nothing wrong with that. As a matter of fact, that might be the simplest way out.

Mr. Tulin: Thank you, your Honor.

The Court: Is that your wish at this time?

Mr. Tulin: I will speak with the Defendant about it.

The Court: I must know that because I must get the United States Marshal.

Mr. Tulin: Your Honor, the Defendant is carefully considering his right of appeal in this particular case and perhaps it is a little premature for him to decide whether [37] to serve the time. I think perhaps in light of that fact we better leave it go until tomorrow.

The Court: Then is 9:00 o'clock the time?

Mr. Tulin: Could we make it 10:00 o'clock?

The Court: Well, then, would you bear in mind it may be necessary for him to stay overnight tomorrow night?

Mr. Tulin: I will, your Honor.

The Court: Without objection then that will be



the order; report tomorrow morning to the United States Marshal at 10:00 a.m. Counsel may be excused.

United States of America,  
Territory of Alaska—ss.

I, Iris L. Stafford, Official Court Reporter of the above-entitled Court, hereby certify:

That the foregoing is a true and correct transcription of proceedings in the above-entitled cause taken by me in stenograph in open court at Anchorage, Alaska, on November 15, 1957, and January 6, 1958, and thereafter transcribed by me.

/s/ IRIS L. STAFFORD. [38]

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[Endorsed]: No. 15926. United States Court of Appeals for the Ninth Circuit. Alfred V. Hagen, Appellant, vs. City of Palmer, Appellee. Supplemental Transcript of Record. Appeal From the District Court for the District of Alaska, Third Division.

Filed October 15, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

